for The Defense

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The Training Newsletter for the Maricopa County Public Defender's Office ⋈ Dean Trebesch, Maricopa County Public Defender

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SHATTERING SOME MYTHS ABOUT THE INTERVIEW PROCESS

By Dan Raynak
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Editor's Note: *A wise person once said that the stature of a myth is measured by how long it can survive despite its established absurdity. If that is the case, then the misconception that the prosecution has the right to control or interfere with defense interviews is right up there with the Loch Ness Monster and the Tooth Fairy. This is one myth that simply refuses to die, despite legal precedent that should have killed it a long time ago.*

A few years ago, then-Deputy Public Defender Dan Raynak directed his wrath and considerable legal skills at this mother of all myths. The result was an article in for The Defense *that became the primer for dealing with prosecutors who insist on controlling the interview process.*

Several new generations of prosecutors and defenders have come and gone since Dan's article was published. Prosecutors continue to insist that they are in control of defense interviews; some have even suggested that it is ***unethical*** *for defense attorneys to arrange their own interviews. So it is high time that we reprint and recirculate Dan's article.*

True to his nature, Dan was not satisfied with simply debunking the many myths about the interview process; he had to ***shatter*** *them.*

Myth #1: The State Controls the Interview Process

Nothing could be further from the truth than the idea that the state controls the interview process. Case law specifically states that neither side may control the interview/ investigative process, and that witnesses belong to neither party. In *Mota v. Buchanan,* 26 Ariz. App. 246, 249, 547 P.2d 517 (1976), the Court of Appeals held that "although a witness may refuse to be interviewed by defense counsel, the prosecution has no right to interfere with or prevent a defendant's access to a witness, absent an overriding interest in security." Citing *Gregory v. United States,* 125 U.S. App. D.C. 140, 369 F.2d 185 (1966); *Lewis v. Court of Common Pleas of Lebanon County,* 436 Pa. 296, 260 A.2d 184 (1969); *Martinez v. State,* 496 P.2d 416 (Oki.Cr.1972); *People v. Jackson,* 116Ill. App. 2nd 304, 253 M.E. 2d 527 (1969); *United States v. King,* 368 F.Supp. 130 (D.C.F.La 1973) and *United States v. Scott,* 518 F.2d 261 (6th Cir. 1975).

In *State v. Draper,* 158 Ariz. 315, 318, 762 P.2d 602 (1988), the Court of Appeals held that "there is a strong similarity between the prosecution's failure to disclose exculpatory evidence and the prosecution's foreclosure of the defendant's right to attempt to discover

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exculpatory evidence himself." *Draper* notes that "while a witness does not have to talk to defense counsel, it is improper for the state to interfere with the right of the defense to attempt to talk to witnesses." 158 Ariz. 315, 318.

The *Draper* court also cites *United States v. Mendez-Rodriquez*, 450 F.2d 1 (9th Cir. 1971) for the proposition that:

> "The gist of a *Mendez-Rodriquez* violation lies in the interference with the opportunity to formulate a defense. Conduct by the government which prevents a defendant from interviewing potential witnesses and making an independent judgment on which witnesses should be called deprives the defendant of the fundamental right to plan and present a defense to criminal charges." 158 Ariz. 315, 318.

See also, *United States v. Tsutagawa*, 500 F.2d 420,423 (9th Cir.1974); *United States v. Cook,* 608 F.2d 1175 (9th Cir.1979), cert. denied 444 U.S. 1034, 100 S.Ct. 706, 62 L.Ed.2d 670 (1980); *State v. Weiss*, 101 Ariz. 315,419 P.2d 342 (1966); *Mota v. Buchanan,* 26 Ariz. App. 246, 547 P.2d 517 (1976); and *State v. Chaney, 5* Ariz. App. 530, 428 P.2d 104 (1967).

The State usually includes in its Notice of Discovery a statement that all interviews are to be arranged by the prosecuting attorney's office. This statement is not grounded in the law, and has no legal effect. In *Draper,* the Arizona Court of Appeals held that:

> "To forbid a defendant the right to attempt to interview witnesses undermines the adversary system and threatens the foundation of our system of justice. Such a condition violates the right to due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States and Article 2, Sec. 4 of the Arizona Constitution, and the right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the Constitution of the United States and Article 2, Sec. 24 of the Arizona Constitution. Even if the condition were not violative of these constitutional rights, it nonetheless is against public policy because it corrupts the truth-finding process.
>
> "We do not suggest that a guilty plea cannot be entered unless and until defense counsel interviews the witnesses in the case, a failure to conduct such interviews will frequently constitute ineffective assistance of counsel." Id.
>
> We have no hesitancy in holding that, except in those most unusual circumstances, it offends basic notions of minimal competence of representation for defense counsel to fail to interview any state witness prior to a major felony trial." Id., citing *State v. Radjenovich,* 138 Ariz. 270, 674 P.2d 333 (1983).

The *Draper* court notes further that "defense counsel's role as an investigator is not confined to those cases which actually go to trial." 158 Ariz. 315, 318.

Myth #2: The State May Determine Who Sets Up the Interviews of the Listed Witnesses in the Case.

Not so. Under *Draper,* and a long line of cases, it is apparent that witnesses to a case do not belong to either party. A typical situation is one in which the state proposes a plea offer, with a deadline for acceptance. The state then also wants to set up the interviews on this particular case, but does not provide a deadline when the interviews will be conducted. Few, if any, of the interviews are conducted prior to the deadline passing for your client to accept the plea agreement. In effect, defense counsel has allowed the state to control the investigative process. The accused is without the benefit of having the matter fully investigated prior to determining whether they should enter into a plea agreement.

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In *Draper,* the court held that:

> "To permit the prosecutor to preclude the defense from interviewing witnesses before the defendant decides whether to enter a plea of guilty would, in many cases, guarantee that counsel was ineffective. Even if such a condition were not so egregious as to run afoul of the state and federal constitutions, we would, because this practice holds so strong a potential for subverting the truth-finding process, condemn it as contrary to public policy." Id. at 319 citing Ethington, 121 Ariz. 572, 592 P.2d 768.

Draper notes that "the protection of these rights is critical, particularly in a system where mandatory sentencing bestows a strong advantage on the state in the plea bargaining process." Id.

Not only may the prosecution not control the interview process by insisting they set up the interviews, but, they may not tell witnesses that they should not speak to defense counsel. The prosecution does have the right to inform witnesses that the state can make itself available for an interview, should that witness choose to have a member of the prosecution present. However, the state may not order, suggest or attempt to coerce any witness into not speaking to defense counsel, or a representative from defense counsel's office, without the state being present. That choice is to be made by the witness, and any attempt by the state to interfere with the defendant's access to the witness is a violation of Rule 15 (providing a variety of sanctions including precluding that witness from testifying at trial).

[T]he state may not order, suggest or attempt to coerce any witness into not speaking to defense counsel, or a representative from defense counsel's office, without the state being present.

Myth #3: It is in the Best Interests of My Client to Appease the State and Allow Them to Set Up the Interviews

Very often the state's investigation is completed at the time that your client is indicted, or set for a preliminary hearing. Therefore, defense counsel must play catch-up.

While some prosecutors are offended by the notion that the defense attorney would want to investigate the case, most recognize the accused's need to fully investigate in order to prepare the case for trial. The state has an interest in having convictions upheld on appeal, not reversed due to ineffective assistance of counsel. If the state's case is strong, there is no harm in having the defense investigate the case.

Defense counsel may only bargain from a position of strength if he or she is fully informed and has had the opportunity to investigate the case. The best plea bargains are achieved after the defense has an opportunity to investigate the case, and in many instances, uncover exculpatory evidence. Negotiations are then on a more equitable level, and often result in a better disposition for the client.

Myth #4: I Really Don't Have Any Control Over the Interview Process, and I Have No Alternatives Should the Alleged Victim Refuse to be Interviewed

All witnesses listed by the state are subject to being interviewed or deposed by defense counsel, with the exception of those who fall under the Victims' Bill of Rights. Even witnesses who are considered victims as provided in the Victims' Bill of Rights may be interviewed. These witnesses may consent to or decline an interview. The first step is to write a letter to the prosecutor asking the prosecution to ask the alleged victim(s) whether he (they) will consent to an interview. If the answer is yes, the interview should be conducted as quickly as possible. As a courtesy, counsel may ask the state to set up the interview; however, if there is any delay, then defense counsel may consider scheduling and conducting the interview with the victim directly.

The state must disclose whether the alleged victim has any prior felony convictions or any misdemeanor convictions involving dishonesty, false statement, or moral turpitude. To ensure that this information is provided, part of the letter requesting an interview with the alleged victim should also include a request for this material. If the information is not received in a timely manner, then a Motion for Discovery citing the specific information being sought should be filed. The motion should be filed early in the discovery process to avoid delay. The letter should also request an avowal that the alleged victim is available to testify at trial. Should the prosecution fail to make the avowal, you may then consider having the court order the state to make that avowal on the record at the next court appearance.

Other information that the defense may seek from the state regarding the alleged victim, depending on the nature of the case involved, includes medical, psychiatric

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and psychological records, or any other relevant information which may be used at trial. For instance, if the state alleges the defendant caused serious physical injury to the victim, then medical records related to those injuries should be provided to the defense in advance of the trial setting. If there is evidence the alleged victim may have been under the influence of alcohol or drugs, that information should be turned over to the defense. This information may be exculpatory pursuant to *Brady v. Maryland,* 373 U.S. 83, S.Ct. 1194, 10 L.Ed.2d 215 (1963), and often it bears directly on the merits of the issues argued to the jury. In *State of Arizona v. Superior Court* (Roper), 172 AZ 232, 836 P.2d 445 (1992), the Court of Appeals held that while a victim may refuse to make available to the defense their medical records:

> "The defendant's due process right to a fundamental fair trial and to present the defense of self-defense overcomes the statutory physician-patient privilege on the facts as presented here, just as a due process right overcomes the Victims' Bill of Rights on these facts." 113 Ariz. Adv. Rep. 11, 15.

The *Roper* court went on to note that while recognizing that the Victims' Bill of Rights is a shield for victims of crimes, "The amendment should not be a sword in the hands of victims to thwart the defendant's ability to effectively present a legitimate defense. Nor should the amendment be a fortress behind which prosecutors may isolate themselves from their constitutional duty to afford a criminal defendant a fair trial." Id. at 16.

A witness is not uncooperative simply because he places reasonable conditions on the interview. To be deemed uncooperative, the conditions must tend to frustrate discovery.

The state may not make the claim that the victim's medical records are not within its possession or control when they have access to the alleged victim, nor can the victim pick and choose what potentially exculpatory evidence to disclose. The accused's fundamental right to a fair trial overrides any Victims' Bill of Rights considerations.

The *Roper* court also stated that:

> "[A]ny restrictions on defendant's access to information essential to preparation for effective, reasonable cross-examination or impeachment of the victim in this case imposed pursuant to the Victims' Bill of Rights must be proportionate to the interests of protecting the victim as balanced against the defendant's due process right to a fundamentally fair trial. A defendant must be afforded an opportunity to effectively cross-examine or impeach the victim, and he must be allowed to cross-examine even on matters that may be potentially revealing, embarrassing or prejudicial to the victim." Id. at 15-16.

The *Roper* court also wrote that "the right to confront witnesses means more than simply being able to physically confront witnesses in the courtroom; confrontation also includes as its 'main and essential purpose' the ability to effectively cross-examine witnesses". Id., citing *Delaware v. Van Arsdall,* 475 U.S. 673, 678 (1986) (quoting *Davis, 415* U.S. at 315). The court may insist that the inspection of medical records be done in-camera; however, these records, if relevant, must be made available to the defense in advance of trial.

Myth #5: I Have No Recourse Should A Witness Refuse to be Interviewed

Rule 15.3(a) provides the criteria for requesting that a person's deposition be taken. The person must have testimony relevant to the case, and that individual must refuse to voluntarily cooperate in the interview process. Note, however, that an alleged victim may not be deposed under Rule 15.3, and may simply refuse to voluntarily cooperate in the interview process.

Often police officers listed as state's witnesses will refuse to return phone calls, or say that the prosecuting agency must set up the interviews. This provides the grounds for requesting a deposition pursuant to Rule 15.3(a).

In *State ex. rel McDougall v. Municipal Court of City of Phoenix Court of Appeals,* 155 Ariz. 186, 190, 745 P.2d 634 (1987), the court held that "[a] witness is uncooperative when he attache[s] (sic) such conditions to an interview that it makes the situation untenable for defense counsel to discover needed material."

However, "a witness is not uncooperative simply because he places reasonable conditions on the interview. To be deemed uncooperative, the conditions must tend to frustrate discovery." Id. If a police officer refuses to return defense counsel's calls, he is frustrating the discovery process. No witness has the right to refuse to

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talk to defense counsel and later claim that he was being cooperative.

Another situation that arises is when the witness involved, often a police officer, says that he insists the prosecutor set up the interview. There is no case law allowing the witness to demand who should set up the interview. In *Kirkendall v. Fisher,* 27 Ariz. App. 210, 212, 553 P.2d 243 (1976), the court held that "where the witness attaches such conditions to an interview that it makes the situation untenable for defense counsel to discover needed material, the witness is being uncooperative within the meaning of the rule." 27 Ariz. App. at 212. The *McDougall* court stated that "a police officer is presumptively cooperative within the meaning of Rule 15.3 if the officer is willing to be interviewed by defense counsel between the hours of 8:00 a.m. and 6:00 p.m. Monday through Friday." *McDougall, 155* Ariz. 186, 190-1.

If the police officer demands that the prosecution set up the interview, then the officer is not giving defense counsel a time between the hours of 8:00 a.m. and 6:00 p.m. Monday through Friday, when he will be available for an interview. He is violating the spirit and intent of the *McDougall* case, and should be deemed uncooperative. Defense counsel does not have to wait until such time as the state decides to set up the interview. There is nothing improper in a police officer, or any other witness, requesting the presence of the prosecuting attorney; however, if that witness refuses to give dates and times when he would be available for an interview, he should be deemed uncooperative and subject to a deposition under Rule 15.3. If the witness wants the prosecutor present, it is his obligation to arrange for the prosecutor to attend the interview.

If the court does grant a request for deposition, please note that opposing counsel must have notice of the deposition. If the state has proper notice of the deposition, and the prosecutor fails to appear, you may proceed with the deposition. Your client also has the right to attend any deposition that is set. Neither party may attempt to preclude opposing counsel from attending the deposition. *Montgomery Elevator Company v. Superior Court,* 135 Ariz. 432, 661 P.2d 1133 (1983). In *Murphy v. Superior Court in and for Maricopa County,* 142 Ariz. 273, 689 P.2d 532 (1984), the Supreme Court of Arizona discusses when the defense may move to compel an individual to be deposed. The Victims' Bill of Rights was passed after the *Murphy* decision, and that decision would no longer apply to alleged victims.

Myth #6: The State May Interrupt Defense Counsel and Ask Questions During Any Portion of the Defense Interview

The purpose of defense counsel requesting an interview on behalf of his client is investigation. Fully investigating the case does not call for interruptions by the prosecutor. They also have the opportunity to request an interview of any listed witness and may do so.

Defense counsel's interview is not the state's opportunity to attempt to rehabilitate a witness they may have listed. The interview time was requested by the defense and the state should not interfere in this process.

On the other hand, if the defense attends an interview arranged by the state, defense counsel should give the same courtesy to the prosecution and not interrupt during the interview.

The prosecutor is not counsel for any witness, including the alleged victim of a crime. If the alleged victim agrees to an interview, while the state may advise an alleged victim of their rights prior to the interview, it does not have the right to control what the alleged victim tells defense counsel.

The prosecutor is not counsel for any witness, including the alleged victim of a crime.

In *State v. Chaney*, 5 Ariz. App. 530, 420 P.2d 1004 (1967), the court held that "it is inconsistent with the role of the prosecuting attorney to discourage witnesses from talking with defense counsel". 5 Ariz. App. 530, 535. In *Mota v. Buchanan,* 26 Ariz. App. 246, 547 P.2d 517 (1976), the prosecution claimed that the police were not independent witnesses but rather "the prosecutor's partners in the fight against crime and criminals." The *Mota* court rejected that contention and held that a witness is not the exclusive property of either the prosecution or the defendant.

> "We are of the view that, in the absence of an affirmative and convincing showing of exceptional circumstances or compelling reasons, a district attorney may not interfere with the pre-trial interrogation by a defense counsel of persons who may be called upon as witnesses in the case. . . . The district attorney may not interfere with or impose his preference or judgement on the defendant. . . . A public prosecutor is entrusted with an awesome duty which requires him to serve the interests of justice in every case. For this

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> reason, a witness who may have information which is favorable to the defense must be made available to the defense." (original emphasis) Id. at 249.

The court in *Mota* held that the state may not interfere with either the defendant's access to witnesses or the interview process, stating: "Unquestionably, we cannot force a district attorney to approve of such questioning; however, we may certainly bar him from communicating his disapproval to the witness." Id. at 249.

Myth #7: If I Have Tape-Recorded an Interview of a Listed Witness by the State, I Must Then Turn Over That Tape Recording Immediately to the Prosecution

The state is required to disclose its witnesses within 20 days after the arraignment. The state generally lists any and all individuals who are mentioned in any police report, grand jury proceeding, preliminary hearing, or any other discovery material. The defense often files a notice of defenses stating that the defense may call any and all witnesses listed by the state. If the defendant has filed such a Notice of Defenses, then the state would be entitled to receive any tape-recorded or written statements by any listed witness, since the defense has adopted the state's witness list.

The prior tape-recorded or written statement of a prosecution witness, which is used only for impeachment, need not be disclosed until the defense actually attempts to impeach the state's witness with that prior recorded statement.

There are certain affirmative defenses that must be alleged by the defense if it intends to raise them at trial. Affirmative defenses include consent (where there is an allegation of forced sexual conduct), alibi, insanity, or mistaken identification. Usually, the listed state's witnesses will not aid the defense in establishing an affirmative defense. It may be true, however, that some of the state's witnesses may impeach the credibility of other state's witnesses. This is not the same as utilizing listed state's witnesses for the purpose of establishing affirmative defenses. Therefore, it is not necessary to list in the Notice of Defenses all of the state's witnesses.

The defendant's Notice of Defenses should only list all witnesses that the defense intends to call at trial to prove its case. The accused may also set forth in the Notice of Defenses that it retains the right to call any listed state's witness for **impeachment purposes only**. If this modified Notice of Defenses is filed, then the defendant is not obligated to give the state any tape-recorded or written statement of a listed prosecution witness, if the defense is not also listing that witness to prove one of their affirmative defenses.

In *Osborne v. Superior Court*, 157 Ariz. 2, 754 P.2d 331 (1988), the Court of Appeals held that the disclosure of prior statements used for impeachment purposes is governed by Rule 613(a) of the Arizona Rules of Evidence.

> "If petitioner determines to use prior statements to impeach a prosecution witness, the prosecutor must be given an opportunity at that time to review the statement in question, and any issue as to the accuracy of the statement or whether it has been taken out of context can be resolved at that point. The mere possibility that such statements may be used and may be inaccurate or taken out of context does not justify a blanket order requiring disclosure of all statements not otherwise covered by Rule 15.2. " (emphasis added) Id. at 5.

The prior tape-recorded or written statement of a prosecution witness, which is used only for impeachment, need not be disclosed until the defense actually attempts to impeach the state's witness with that prior recorded statement. Otherwise, the defense is not obligated to provide the statement to the prosecution.

If there is a listed state's witness that will prove one of the affirmative defenses noticed by the defense, then he should be listed as a defense witness, and any recorded statements taken from him should be turned over to the prosecutor.

Myth #8: It Really Doesn't Matter if I Turn Over All of My Tape-Recorded Statements to the State, Nor Does it Matter that the State Sets Up the Interviews

A police officer gathers information in a case armed with the knowledge that the witnesses they interview will be on the defensive. A police officer may offer their personal thoughts regarding the reactions of a particular witness or suspect, which may enhance or diminish the witness's credibility in front of a jury. Defense counsel has the same opportunity by conducting interviews on their own. This is especially true when defense counsel brings an investigator along to observe and note how a witness reacts during the interview process.

Whenever possible, go to the homes or work sites of civilian witnesses, to not only obtain a better interview,

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but also to possibly obtain new information relevant to the case from other potential witnesses.

Showing up on a potential witness's doorstep, whether it be at work or at his home, is probably the single best way to obtain the truth. The witness does not have the luxury of sitting in the comfort of the county attorney's office, believing that individual is his attorney, and that he can act in a more cautious manner in approaching the interview. This individual is face-to-face with the microphone, and being asked questions about the incident. A witness who shows obvious signs of nervousness, or takes long pauses between answers, or must consult with someone else prior to giving certain answers, often loses credibility in front of a jury. Even his refusal to grant an interview at that time may be used to impeach his credibility at trial. Jurors would certainly stop and wonder why an individual would refuse to be interviewed. What does he have to hide?

One of the standard jury instructions provides that the manner of a witness while testifying may be taken into account by the jury. His manner while discussing any aspect of the case prior to the trial is also relevant. Most jurors want to know why alleged victims do not want to talk to the defense, and they also want to know why witnesses have been uncooperative. This raises questions regarding the witness's credibility in the minds of the jurors, and is often the difference between your client being successful or unsuccessful at a trial.

Police officers often feel most relaxed in their own police station. They are more congenial and more willing to talk to defense counsel without worrying what the prosecutor may think about their comments. Police officers are very candid in assessing a case, when they have this opportunity to express their thoughts in a one-on-one interview. Furthermore, if a police officer tape-records the interview, this may again be brought out at trial, especially if the police did not tape-record statements purportedly made by your client. Jurors will wonder why the police thought it was necessary for their thoughts to be tape-recorded, but did not feel it important enough to tape-record the defendant's statement, especially when the defendant was facing criminal charges. A police officer may, however, insist on the interview taking place at the police station and this would not be considered uncooperative under the *McDougall* holding.

As the attorney you should have a theory of the case in mind, and all questioning of any witness should be tailored to fit into your theory of the defense.

Often police officers insist that interviews be conducted at the police sub-station. It may seem like too much work to go to the police station to conduct the interview. In many cases neither the state nor the defense have all of the police reports, including supplements, for a particular case. If you are conducting the interview at the police station, you may determine how many supplements were written to a particular report. It is a very simple process to have the police officer run off a copy of the supplements you do not have. Often these supplements contain exculpatory information, or list witnesses that lead to exculpatory information. Additionally, there may be related departmental reports, photographs, field interrogation cards, etc.

Interviewing witnesses who live at or near the scene of the alleged crime allows you to view the scene as it relates to the witnesses' statements. You also, often, uncover new witnesses. (I have literally had new witnesses walk up to me at the scene and tell me they have relevant information.)

Disclosing tape-recorded statements of a listed state's witness (not listed by the defense) should only be done if you believe the state will offer a better plea. It is a distinct advantage at trial to have in your possession impeachment evidence of which the state is not aware. There usually is no reason to give up such an advantage at trial.

Myth #9: If a Witness is not Listed on the State's List, and He Refuses to be Interviewed, I Have No Options Prior to Having Him Testify at Trial

Rule 15.3(a)(2) provides that when: a "party shows that the person's testimony is material to the case or necessary adequately to prepare a defense or investigate the offense, . . . and that she will not cooperate in granting a personal interview" then she may be subject to a deposition. There is no requirement that the person be listed as a witness prior to requesting that this individual's deposition be taken. You must first ask the person if he is willing to consent to a voluntary interview. If he refuses to speak to you, and you have a good faith belief that he has information relevant to the defense of your client, then you may proceed to request the court order his deposition. If the court grants the deposition, and you learn during the deposition process that this person has relevant information, you should then list the individual as a witness to the trial. You are not required to list that person as a witness until you have actually had the opportunity to interview him. However, if you are close to the deadline for filing a list of witnesses, as a precautionary note you may want to list him prior to the deposition.

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Myth #10: It Really Does Not Matter Who Does the Interviews, It is Simply Easier to Allow My Investigator to Conduct the Investigation of This Case

Having an investigator assigned to a case, and making them an integral part of the investigation is often essential. However, the assigned attorney should conduct the interviews of primary witnesses personally. I have had the opportunity to talk with many of the fine investigators associated with our office, and the consensus is that they would prefer the attorneys to do the interviews, especially when they involve major witnesses. This is not a comment on the ability of the investigator to conduct the interview; however, as the attorney you should have a theory of the case in mind, and all questioning of any witness should be tailored to fit into your theory of the defense.

Taking your investigator along on some of the critical interviews is an excellent idea. The investigator is not only there for impeachment purposes, even if the interview is being tape-recorded, but he or she may also comment on the emotional state of the witness at the time of interview, how the witness reacts to questions, etc. The investigator may take the stand at trial and talk about a particularly nervous witness, or a witness who was being evasive. I recently tried a case in which one eye-witness to the incident was visibly nervous upon our arrival at his home, unannounced, and he proceeded to make a series of phone calls before he agreed to an interview. These facts were presented to the jury, through the testimony of the assigned investigator, and considerably lessened the credibility of that witness. Another eye-witness in the same case stated under oath that he had not been attempting to avoid being interviewed by our office, and that he had only received one card from our office, left on his door, and he had lost the card. The investigator took the stand and testified that he had made several stops at that house and had left both letters and cards on numerous occasions. The credibility of that witness was greatly diminished in the minds of the jurors.

The investigator . . . may also comment on the emotional state of the witness at the time of interview, how the witness reacts to questions, etc.

In conclusion, do not accept the "old wisdom" about the interview process. Review the cases cited in this article to obtain a better understanding of what your options are during the interview process. You will find that your frustration with the state's lack of diligence will disappear.

The purpose of this article is to give helpful hints on how to approach the interview process. It is not only the correct way to investigate a case, but it insures that your client will be given the very best defense. ■

YOU CAN NEVER COMPLAIN AGAIN:

State's Lack of Diligence Results in Dismissal of Late Appeal

By Joel M. Glynn
Deputy Public Defender-Appeals

How many times have you complained that "The prosecutor can do whatever he wants" or "All the State has to do is file a motion and it's granted" or "If I had filed that motion it would have been denied." I'm here to tell you that's not the case. My recent experience involving a juvenile appeal confirms my long-standing belief that diligence, persistence, and "good facts" will usually prevail. I want to assure you that I'm not writing this article in order to gloat. Rather, I'd like to share my experience with you only because the State sometimes appeals adverse rulings and this may not be the last time that this issue surfaces.

My case involved the untimely filing of a Notice of Appeal by the State and the State's inability to demonstrate that their failure to file a timely notice of appeal was due to "excusable neglect" or "due diligence." The following is the factual and procedural history of my case:

The State filed a petition against the juvenile, alleging delinquent conduct. The juvenile's attorney (a member of this office) filed a Request for Voluntariness Hearing in April, 1996. A voluntariness hearing was held pursuant to the juvenile's request in July, 1996. Following that hearing, the assigned judicial officer found that the juvenile's statements to a police officer were involuntarily made and therefore inadmissible.

The prosecutor filed a written Motion to Dismiss without prejudice on August 23, 1996 in order to appeal the court's adverse suppression order. The prosecutor also submitted a proposed form of order, which featured the name, office, and address of the prosecutor. The court granted the State's motion to dismiss in open court and signed the State's proposed form of order on August 23, 1996. The clerk filed the signed order on the same day.

A second order granting dismissal without prejudice was featured in a minute-entry dated August 23,

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1996. That minute-entry was signed by a substitute judicial officer on September 4, 1996 and filed by clerk on the same day.

A third written order granting dismissal was signed on September 12, 1996. However, the clerk did not file the signed order until September 16, 1996.

The State filed a Notice of Appeal on September 19, 1996. My copy of the record on appeal did not include the State's form of order which the court signed and the clerk filed on August 23, 1996. I only discovered the existence of the August 23rd order when I visited the Court of Appeals on the same day that my Answering Brief was due. I filed the Answering Brief that day and argued that the Court of Appeals lacked jurisdiction to consider the State's appeal, because the State's Notice of Appeal was not timely filed. I also filed a motion to dismiss the State's appeal with the Court of Appeals, asking that court to dismiss the State's appeal for the same reasons.

The Court of Appeals issued an order on April 24, 1997, finding that 1) the juvenile court's signed order of dismissal, filed August 23, 1996, was it's "final" order and 2) that the question whether the prosecutor's failure to file a timely notice of appeal was the result of "excusable neglect" could not be resolved from the record on appeal. The Court of Appeals remanded the juvenile's matter to the juvenile court and directed the presiding judge to rule on the question whether the State's failure to file a timely notice of appeal was the result of excusable neglect.

The State's policy not to file a Notice of Appeal until receipt of the juvenile court's signed minute-entry or order does not constitute "excusable neglect" or demonstrate "due diligence."

The State then filed a Motion to Excuse Untimely Notice of Appeal in juvenile court, claiming that the prosecutor never received notice that the judicial officer signed the State's submitted form of order on August 23, 1996. The State's representative at the hearing on remand also claimed that the time to file a Notice of Appeal did not begin to run until the State received a signed minute-entry from the assigned judicial officer. Put another way, the State's policy was not to file a Notice of Appeal until they received the minute-entry.

The Presiding Juvenile Court Judge eventually found that the State's failure to file a timely Notice of Appeal was not the result of "excusable neglect." After he transferred his written findings to the Court of Appeals, the Court of Appeals issued its order, dismissing the State's appeal.

Now that you've "heard the punch line," let's examine the reasons why the correct result was achieved in this case: The State's policy not to file a Notice of Appeal until receipt of the juvenile court's signed minute-entry or order does not constitute "excusable neglect" or demonstrate "due diligence." A greater effort to monitor their case must be shown before the State is entitled to a delayed appeal.

Rule 25, Rules of Procedure for the Juvenile Court ("RPJC"), provides the time within which an appeal may be taken: "A notice of appeal must be filed within 15 days after the final order of the juvenile court is filed by the clerk. The time to file a notice of appeal may be excused upon motion made after the expiration of the 15-day period only where the failure to timely file was the result of excusable neglect." RPJC 29(b).

The first question is "What constitutes a 'final order' for purposes of RPJC 25(a)?" The answer is not so simple. There is no fixed or universal definition of what constitutes a "final order" for purposes of RPJC 25(a). Questions of finality of juvenile court orders for purposes of appeal must be resolved by reference to developing case law. *See*, Notes to 1996 Amendments to RPJC 25, *supra*; 1 Arizona Appellate Handbook § 6.4.1 (1992). The law is clear, however, that when the State desires to appeal from an adverse ruling on a motion to suppress, the State may move the trial court to dismiss the cause of action without prejudice and then file a Notice of Appeal within the appropriate time period. *See, State v. Million,* 120 Ariz. 10, 583 P.2d 897 (1978).

What then constitutes the "final order"? In my case, was it the prosecutor's submitted form of order which the court signed and the clerk filed on August 23, 1996, or was it either of the two signed minute-entries filed on September 4, 1996 or September 12, 1996, respectively? RPJC 25 again answers this question. A "final order" shall be in writing and signed by the judge before the appeal can be taken. The "final order" may be in the form of a minute-entry or separate written order. Therefore, a signed form of order or minute-entry share the same integrity for purposes of RPJC 25(a). However, neither constitutes a "final order" until it is filed by the Clerk. Therefore, the August 23, 1996 order (the form of order submitted by the prosecutor) constituted the final written order for purposes of Rule 25(a).

The next question is whether the prosecutor exercised due diligence in determining the status of the

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case and whether the untimely filing of the notice of appeal was the result of "excusable neglect." The prosecutor's decision to wait until he received the juvenile court's signed order does not constitute "due diligence." A prosecutor's decision to merely wait until he receives a signed minute-entry before filing a Notice of Appeal is careless. "Carelessness" does not constitute "excusable neglect." When an attorney submits a proposed form of order prepared for the court's signature, it is incumbent upon the attorney to regularly contact the court to determine the status of the motion and order. A prosecutor can hardly claim surprise, when the State's oral motion to dismiss without prejudice is granted in open court and the court signs the written form of order submitted by the prosecutor. Under the circumstances, a prosecutor is careless when he/she fails to contact the court, fails to contact the courtroom clerk, and/or fails to contact court personnel to determine if the judicial officer had signed the prosecutor's submitted form of order.

What then constitutes "excusable neglect"? RPJC 29(b) specifically incorporates Rule 6(b), Arizona Rules of Civil Procedure ("Ariz.R.Civ.P"), and governs requests for extension of time for filing pleadings, motions, and other documents in juvenile court. Rule 29(b), *supra*, also uses the term "excusable neglect" in its delayed appeal procedure. The expression "excusable neglect" is not unique to Rule 29(b), *supra*. Other rules and existing case law define this term as well.

The case law relating to the Arizona Rules of Civil Procedure can be our ally and not just some irrelevant beast that only causes us to wince any time we have to read it.

Before I continue, let me mention that the case law relating to the Arizona Rules of Civil Procedure can be our ally and not just some irrelevant beast that only causes us to wince any time we have to read it. For some of you, the last time that you had to read this body of law may have been during law school. That may have been a long time ago. Don't be afraid! Civil case law and procedure define legal expressions and regulate counsel's conduct. This body of law is also woven into the Arizona Rules of Procedure for the Juvenile Court.

RPJC 29(b) does not specifically incorporate Rule 60(c), Ariz.R.Civ.P.. As a matter of fact, Rule 60(c) does not govern a juvenile's right to a delayed appeal. *State v. Berlat*, 146 Ariz. 525, 508, fn. 1, 707 P.2d 303, 306, fn.1 (1985). Although not specifically incorporated by RPJC 29(b), Rule 60(c), which relates to relief from civil judgments or orders, also uses the same term featured in RPJC(b): "excusable neglect."

"Excusable neglect" has been defined as "reasonable and foreseeable neglect or inadvertence." A.R.S. § 12-821(A); *Pritchard v. State,* 161 Ariz. 450, 778 P.2d 1346 (App. 1989). The Arizona Supreme Court in *City of Phoenix v. Geyler,* 144 Ariz. 323, 697 P.2d 1073 (1985) had this to say:

> "The standard for determining whether conduct is 'excusable' is whether the neglect or inadvertence is such as might be the act of a reasonably prudent person under the same circumstances. *Coconino Pulp v. Marvin*, 83 Ariz. at 120, 317 P.2d at 552. Many cases have been decided since *Coconino Pulp,* and we do not intend to review them all. We recently indicated that clerical and secretarial errors in office procedures are 'unavoidable and . . . [often] excusable.' *Daou v. Harris*, 139 Ariz. 353, 360, 678 P.2d 934, 941 (1984). We noted again that the 'test of what is excusable is whether the neglect or inadvertence' is the type that might be 'the act of a reasonably prudent person.' *Id.* at 359, 678 P.2d at 940. If there is a trend in the Rule 60(c)(1) cases and those decided under the identical federal rule, it is that diligence is the final arbiter of whether mistake or neglect is excusable. *Rodgers v. Watt*, 722 F.2d 459-60; *see* generally, *Daou v. Harris, supra; Smith v. Jackson Tool & Die,* 426 F.2d 5 (5th Cir. 1970); Calkins, *The Emerging Due Diligence Standard for Filing Delayed Notice of Appeal in Federal Courts*, 19 Willamette L.J. 609 (1983)." *Id.*, 144 Ariz. 331-332, 697 P.2d at 1081-82.

In the text of an attorney's action or inaction, Arizona appellate courts have found excusable neglect:

1. Where the attorney had been using established office procedures designed to insure a timely response, "but was deflected by one of the many interruptions that beset practitioners in modern legal practice" (*Addison v. Cienega, Ltd.*, 146 Ariz. 322, 705 P.2d 1373 (App. 1985)); or

2. Where the "mistake or neglect . . . was a type of clerical error which might be made by a reasonably prudent person who attempted to handle the matter in a prompt and diligent fashion." *City of Phoenix v. Geyler,* 144 Ariz. at 322, 697 P.2d at 1082; *Ulibarri v. Gerstenberger,* 178 Ariz. 151, 163-164, 871 P.2d 698, 709-710 (App. 1983).

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The Arizona Court of Appeals noted in *Ellman Land Corporation v. Maricopa County,* 180 Ariz. 331, 340, 884 P.2d 217, 226 (App. 1994) that:

> "Arizona courts have been predominately unforgiving, however, when confronted with the lawyer's legal error in reading the statutes and case law. *E.g., Daou,* 139 Ariz. 359, 678 P.2d at 940 (defendant's erroneous belief that because action was not referred to a medical liability review panel, he did not have to answer, not excusable neglect); *General Electric Capital Corporation v. Osterkamp,* 172 Ariz. 185, 190, 836 P.2d 398, 403 (App. 1992) (counsel's erroneous belief that no judgment could be taken if an answer was filed before a motion for a default judgment not legally excusable); *M & M Auto Storage Pool v. Chemical Waste Management, Inc.,* 164 Ariz. 139, 142, 791 P.2d 665, 668 (App. 1990) (counsel's view that dismissal of motions for summary judgment constitute a final judgment not legally excusable)."

In my judgment, the State must show that the assigned prosecutor made some effort to monitor the status of the case or conducted some inquiry to avoid the running of the 15-day deadline.

Clearly, if a judgment is acquired as a result of a party's mere neglect, inadvertence, or forgetfulness without a reasonable excuse, the judgment will not be disturbed. *Daou v. Harris, supra.* If the defaulted party fails to explain, by affidavit or otherwise, his failure to take the required responsive action, the motion to vacate an entry of default or default judgment must be denied. *Baker Intern. Associates, Inc. v. Shanwick Intern. Corporation,* 174 Ariz. 580, 851 P.2d 1379 (App. 1993).

Considering this standard, if the State fails to demonstrate, by affidavit or otherwise, any circumstances which constitute excusable neglect or due diligence in determining whether the judicial officer signed the submitted form of order, the State is simply not entitled to a delayed appeal. In my judgment, the State must show that the assigned prosecutor made some effort to monitor the status of the case or conducted some inquiry to avoid the running of the 15-day deadline. Due diligence equates with contacting the juvenile court on a daily basis, as the deadline approaches, to determine if the order had been signed. This is particularly true, if the assigned prosecutor contemporaneously submitted copies of the original order to the juvenile court to be conformed and returned to counsel. Absent this showing, the State's request to excuse their conduct or the untimely notice of appeal should be denied.

The State is saddled with a greater burden, when they seek to file a delayed appeal. Why? The Arizona Supreme Court answered this question in *City of Phoenix v. Geyler, supra*:

> "[Because] the party seeking relief has had his day in court since the case has already been litigated on its merits, . . ., the principle of finality carries greater weight than when the movant is seeking relief from judgment by default. A stronger showing, therefore, should ordinarily be required to justify relief. *Rodgers v. Watt, supra.* We believe the criteria established by an *en banc* panel of the 9th Circuit in *Rodgers v. Watt* adequately addresses these concerns:
>
> 'Specifically we hold that in determining whether Rules 60(b) is applicable [in a delayed appeal situation] a court should consider (1) absence of Rule 77(d) notice; (2) lack of prejudice to respondent; (3) prompt filing of a motion after actual notice; and (4) due diligence, or reason for a lack thereof, by counsel in attempting to be informed of the date of the decision.'
>
> 722 F.2d at 460. These factors, combined with a showing under *Park v. Strick, supra,* of 'extraordinary,' 'unique,' or 'compelling' circumstances, establish the proper standard for determining whether to grant Rule 60(c) relief. The party seeking delayed appeal must, therefore, not only make the showing generally required for relief under Rule 60(c), but must also meet the most stringent standards of *Rodgers v. Watt, supra.*" 144 Ariz. at 328, 697 P.2d at 1078.

Considering this standard, the prosecutor can only demonstrate due diligence or excusable neglect in failing to file a timely notice of appeal by showing more than merely reviewing a trial file or waiting to receive a signed

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minute-entry. The prosecutor must make at least some attempt to monitor the status of the case and/or determine whether the submitted form of order has been signed by the judicial officer. The prosecutor is only prudent if he/she cautiously monitors the status of the case and attempts to discover whether the submitted form of order has been signed as the sensitive deadline to file a Notice of Appeal approaches. Again, the prosecutor's responsibility "to-be-more-than-passive" is supported by case law:

In *Park v. Strick, supra,* the Arizona Supreme Court held that where an aggrieved party establishes lack of knowledge that a judgment has been entered and asserts additional reasons that are so extraordinary as to justify relief, the trial court is authorized to vacate judgment and re-enter a new judgment in order to allow the party to file a timely appeal. However, when the complaint is only that the party did not receive the form of notice to which a party was entitled (Rule 77(g), Ariz.R.Civ.P. requires the clerk to mail copies of minute-entries to all parties), that party is not entitled to a delayed appeal. In so holding, the court acknowledged that 1) the time period for appeal begins to run from the date of entry of judgment, and 2) notice of the entry is not necessary to start the appeal time running (137 Ariz. at 103, 669 P.2d 81). The court further observed that:

> ". . . an attorney has a duty to insure that 'matters subject to prescribed time limits are acted upon within those limits, or that other appropriate action is taken to preserve [a] client's rights.' *Kiefer v. May*, 22 Ariz. App. 567, 569, 529 P.2d 721, 723 (1974). Rule 77(g) clearly implies that a party has the duty to take legal steps to protect his or her interests and cannot simply rely on the court to provide notice. *See Hensley v. Chesapeake and Ohio Railway Company,* 651 F.2d at 231.
>
> With these competing principles in mind, we reach the following conclusion. Rule 77(g) restricts the power of an Arizona trial court to grant Rule 60(c)(6) relief where the only ground is the failure to give or receive the notice required by Rule 77(g). Where, however, an aggrieved party establishes lack of knowledge that judgment has been entered, and asserts additional reasons that are so extraordinary as to justify relief, we hold that the trial court has authority under Rule 60(c)(6) to vacate the judgment and reenter a new judgment in order to allow the party to file a timely appeal. In other words, relief under Rule 60(c)(6) may be considered where the party did not have knowledge from any source that judgment had been entered and where there are extraordinary circumstances. However, where the complaint is only that the party did not have or get the formal notice to which a party is entitled by Rule 77(g), the relief is not available." 137 Ariz. 104, 669 P.2d 82.

The prosecutor must make at least some attempt to monitor the status of the case and/or determine whether the submitted form of order has been signed by the judicial officer.

In *Buckeye Cellulose Corporation v. Braggs Electric Construction Company,* 569 F.2d 1036 (8th Cir. 1978) 1) none of the parties knew that judgment had been entered; 2) none of the parties could be said to have relied on the notice of entry of judgment; 3) plaintiff's counsel had made three inquiries at the clerk's office to determine the status of the case; and 4) counsel acted diligently after learning of the entry of judgment. The Court of Appeals held that under these circumstances, the trial court had the authority to vacate judgment under Rule 60(b)(6) in order to permit the filing of a notice of appeal.

In *Smith v. Jackson Tool & Die, Inc.*, 426 F.2d 5 (5th Cir. 1970), counsel for the plaintiff was out of the country when he was advised that a decision had been reached in his client's case. He immediately contacted the trial judge and requested that entry of judgment be withheld until he returned. The opposing attorney did not object to this request but did submit a proposed form of judgment to the trial judge. The trial judge, without the knowledge of either counsel, entered judgment. In addition, the clerk inadvertently failed to send the required notice to the parties. When plaintiff's counsel learned of the entry of judgment, he promptly moved to set aside the judgment. The Court of Appeals held that the trial court did not abuse its discretion, when it vacated the judgment and reentered the same judgment to permit an appeal.

In *Rodgers v. Watt, supra*, the trial court found that counsel's failure to discover entry of judgment constituted excusable neglect and granted the motion for relief from judgment so that a timely appeal could be taken. The Ninth Circuit Court of Appeals agreed with

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the trial court's decision, because the record reflected that 1) the clerk failed to notify the parties of the entry of judgment, 2) the entry was not made in the order on the docket, 3) appellant's counsel had his secretary repeatedly check the docket to see if judgment had been entered, and 4) the secretary repeatedly indicated that the last entry indicated only that the matter had been taken under advisement. The Ninth Circuit repeated that "the failure of the clerk to give notice is not a ground by itself, for finding of excusable neglect. Fed. R. Civ. P. 77(d)." 722 F.2d at 460.[1]

In *In re Appeal in Pima County, Juvenile Action No. B-9385,* 138 Ariz. 291, 674 P.2d 845 (1983), the Arizona Supreme Court 1) recognized that the same principles that limit the authority of trial judges in changing civil judgments also apply to juvenile court judges in final orders in adoption and dependency matters; 2) cited the standards announced in *Park v. Strick, supra*; and 3) necessarily acknowledged that "where the complaint is only that the party did not have or get the formal notice to which a party is entitled by Rule 77(g), the relief is not available." 138 Ariz. at 295, 674 P.2d at 849.

A prosecutor should be held to the same standard that is applied to other licensed practitioners, when determining whether the prosecutor acted prudently or diligently.

In *Davis v. Davis,* 143 Ariz. 54, 691 P.2d 1082 (1985), the Arizona Supreme Court found that the wife was entitled to have judgment set aside in order to permit appeal, because the following circumstances indicated "due diligence" and constituted "excusable neglect":

> ". . . appellant made three inquiries within a little more than a month after judgment. During this time, she visited four different offices a total of seven times in searching for the file. Such persistence indicates due diligence." 143 Ariz. at 59, 691 P.2d at 1082.

In each of these cases, counsel's diligence and persistence paid off. They were not careless. The attorneys involved in the following cases, however, were not so fortunate:

In *M & M Auto Storage Pool, Inc. v. Chemical Waste Management, Inc.,* 164 Ariz. 139, 791 P.2d 665 (App. 1990), *M & M*'s attorney claimed "excusable neglect" because he thought he could rely on the trial court's April 22, 1986 minute entry. The Court of Appeals rejected his claim and held that:

> "We do not view counsel's reliance on a minute entry and failure to obtain a final resolution of a special action for almost two months as excusable neglect for purposes of Rule 60(c)(1)."164 Ariz. at 142, 791 P.2d at 668.

Similarly, in *Baker International Associates, Inc. v. Shanwick International Corp.,* 174 Ariz. 580, 851 P.2d 1379 (App. 1993), the Court of Appeals affirmed the following findings of the trial court:

> "intentionally waiting until the plaintiff seeks a default judgment before filing an answer is not 'handl[ing] the matter in a prompt and diligent fashion,' and is not the conduct of a reasonably prudent lawyer."
> 174 Ariz. at 584, 851 P.2d at 1383.

Counsel's diligence, persistence, and prudence as opposed to "carelessness" are the common ingredients in all of these cases. A prosecutor's inaction (waiting for a minute entry) amounts to carelessness. A prudent attorney would either contact the trial court, the courtroom clerk, or court personnel or conduct an inquiry through JOLTS to determine whether the assigned judicial officer had signed the submitted form of order. *C.f., Beal v. State Farm Mutual Automobile Insurance Company,* 151 Ariz. 514, 729 P.2d 318 (App. 1986).

A prosecutor should be held to the same standard that is applied to other licensed practitioners, when determining whether the prosecutor acted prudently or diligently. An attorney should be held to the same standard, whether the attorney is engaged in the private or public practice of law or whether the case is litigated in the civil, domestic relations, criminal, or juvenile arena. The circumstance that the case happens to be a juvenile matter or the attorney practices law in the public sector rather than the private sector does not change counsel's responsibility to diligently monitor his case or create a new definition for the word "carelessness." I can assure you that attorneys in the civil, domestic relations, and probate bar monitor the progress and paper flow of their cases very diligently. If they submit a proposed form of order or judgment *ex parte* or at a hearing and the matter is taken under advisement, you can bet that the attorney and/or his secretary will regularly contact the court or courtroom clerk to see if the submitted form of order or judgment has been signed. A prosecutor should be no less diligent.

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A prosecutor, therefore, is not entitled to a delayed appeal, if the prosecutor fails to show, by affidavit or otherwise, any circumstances which constitute excusable neglect or demonstrate due diligence in determining whether the assigned judicial officer signed a submitted form of order. The prosecutor cannot simply rely on receipt of a minute-entry. Waiting to receive a minute-entry does not constitute "due diligence" or "excusable neglect." Due diligence equates with contacting the court on a daily basis, as the deadline approaches, to see if the order has been signed. This is particularly true, if copies of the original form of order had been contemporaneously submitted to the court. Absent that showing, a prosecutor should not be allowed to file an untimely Notice of Appeal.

1. The equivalent to Rule 77(d), Federal Rules of Civil Procedure, is Civ. Rule 77(g), Arizona Rules of Civil Procedure. Rule 77(g), *supra*, provides in part that "lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except has provided in Rule 9(a), Arizona Rules of Civil Appellate Procedure." ■

ARIZONA ADVANCE REPORTS A Summary of Criminal Defense Issues: Volume 246-247

By Terry J. Adams
Deputy Public Defender-Appeals

***State v. Cisneroz* 246 Ariz. Adv. Rep. 51 (CA 7/1/97)**

Disorderly conduct is not a lesser included offense of drive-by shooting.

***State v. Peters* 246 Ariz. Adv. Rep. 10 S. Ct. 6/26/97)**

A police officer saw the defendant arrive at Sky Harbor and check three large hard-sided bags. The officer went to the baggage area and examined the bags by squeezing their sides. He detected a strong sweet odor, he placed each on its side and pressed down and felt a hard, solid mass. The bags were taken to the security office. The defendant was located on the plane and asked to leave which he did. The plane departed and the defendant was arrested and a search warrant for the bags was obtained, which contained 60 pounds of marijuana. The officer testified at the suppression hearing that traffickers pack bales of marijuana in large new suitcases without ID tags and use an agent to mask the smell. When this is observed they investigate further by lifting the bags and squeeze them to detect any odor and feel them to detect a solid mass. Also considered is the amount of luggage, lateness of arrival, level of nervousness, and destination. Had nothing been suspicious after he examined the bags, he would have made the flight. The trial court suppressed the evidence relying on *State v. Randall*, 116 Ariz. 371, 569 P.2d 313(App. 1977) which held that a brief detention of luggage under these circumstances violates the owner's Fourth Amendment rights. The Supreme Court here holds that this procedure does not interfere meaningfully with a defendant's possessory interest in the luggage and does not invade a reasonable expectation of privacy and therefore is not a seizure under the Fourth Amendment. *Randall* is therefore effectively overruled.

***State v. Reimer* 246 Ariz. Adv. Rep. 53 (CA 7/1/97)**

The police, in answering a "check welfare" call found the defendant's wife covered with blood and wounds. She advised the cops that her husband had pointed a shotgun at her, threatened to kill her and hit her with the butt of the gun. At trial she denied that any of this occurred. She said that on the night of the incident she was "under duress" (her BAC was .342, which could cause some duress). Anyway, the prosecutor asked the cop his opinion as to her truthfulness on the night in question, apparently qualifying him as an expert. The appellate court held that either as an expert or lay observer this testimony was not permissible (see rules 701 & 702 Rules of Evidence) and reversed. The court held that the trial court, by approving the officer's foundation as an expert in truth telling and permitting him to opine on the truthfulness of testimony, clearly abused its discretion.

***State v. Weinstein* 246 Ariz. Adv. Rep. 45 (CA 6/19/97)**

A man driving a new white Jeep Cherokee went to a Mail Boxes Etc. to deliver a package overnight. The employee suspected the package contained contraband for reasons that would not pass constitutional muster and opened it. It contained heroin, he contacted the police who took it and gave the employee a number to give to anyone who inquired about it. The addressee called and the police arranged to deliver it to her. At the time of the delivery the defendant pulled up in a new white Cherokee. A narcotics dog alerted to the defendant and the jeep. A search of the Jeep produced heroin. A search warrant was obtained for the house and more contraband was found. The motion to suppress alleged that the employee was acting as a police agent and therefore because of lack of probable cause the evidence should be suppressed. Even though the employees always called the cops when they suspected contraband, and had a relationship with the police, because there was no compensation and there was never any further contact once a package was turned over, the court held that the level of police involvement here

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was insufficient to create an agent relationship. The resulting car and house searches were also legal.

***Kizzar v. Superior Court* 246 Ariz. Adv. Rep. 22 (CA 6/24/97)**

Under A.R.S. § 13-604(E) a prior conviction must precede the commission of the present offense before the sentence can be enhanced. This is unlike §13-604(B) wherein a sentence can be enhanced as long as the defendant was convicted of the other offense before the conviction in the principal offence.

***Christopher, In re*, 247 Ariz. Adv. Rep. 44 (CA 7/15/97)**

Juvenile convicted of facilitating criminal damage and trespass. He had a party in his recently deceased grandmother's house. The party-goers proceeded to trash the place by breaking windows, damaging walls, etc. There was no evidence that he participated. Because there was no evidence that the Juvenile knew the invitees would damage the house and even if he had a duty to stop the participants, there was no evidence that he didn't attempt to do so, he could not be convicted of facilitation. There was, however, sufficient evidence to convict him of trespass.

***Soto v. Superior Court.* 247 Ariz. Adv. Rep. (CA 7/15/97)**

The Juvenile Crime Initiative (Proposition 102) amendment to the constitution upheld as constitutional. It was validly proclaimed law on Dec. 6, 1996. Its provisions require that the defendant, who was accused of forcible sexual assault, be automatically transferred to be tried as an adult. The amount of bail imposed was not excessive even though he did not have the means to pay it and is a ward of the court.

***State v. Adler 247* Ariz. Adv. Rep. (S.Ct. 7/15/97)**

The defendant was placed on probation in 1987. A petition to revoke was filed in 1988 alleging failure to report etc. There was no attempt to proceed *in absentia*. In 1990 Arizona was notified that he was serving a federal sentence in Seattle. In 1991 the defendant filed a motion for speedy disposition or for Arizona to proceed *in absentia*. That request was denied. In 1994 the defendant moved to dismiss the petition because the length of the delay violated due process. That was denied. In 1995 a violation hearing was conducted with the defendant appearing telephonically, he was found in violation and sentenced to a consecutive term to his federal sentence. On appeal the court found that the delay was unreasonable and violated due process. The court could have proceeded *in absentia*, as the defendant requested or telephonically as early as 1991. The defendant suffered prejudice because by the time he was sentenced he lost the opportunity to have the sentences run concurrently.

***State v. Garza* 247 Ariz. Adv. Rep. 33 (CA 7/15/97)**

The defendant was convicted of three counts of armed robbery and one count of agg assault. The court sentenced her to consecutive terms of imprisonment that it felt was mandated under § 13-702.02 and 13-708. However the court stated that it felt the sentence was clearly excessive citing § 13-603, but did nothing in accordance with that statute. The court of appeals held that if the trial court makes findings of excessive sentence under § 13-603 and allows the defendant to petition the board of executive clemency for a commutation of sentence, it must file a special order setting out the reasons for concluding that the sentence is clearly excessive.

***State v. Riggs* 247 Ariz. Adv. Rep. 7 (S.CT. 7/15/97)**

This is a consolidated appeal to determine if defense counsel is permitted to cross-examine a victim regarding refusal to submit to a pre-trial interview. The answer: ARS §13-4433 neither authorizes nor precludes it. Admission of evidence of refusal is governed by the rules of evidence. Meaning the trial court can rule and will be reviewed only for abuse of discretion. As Justice Feldman points out in his dissent this ruling requires defense counsel to do the impossible, requiring a showing of relevance before the victim can be asked first whether he or she refused the interview and then about the reasons for such refusal. He expresses the hope that "...trial judges will give defense counsel wide latitude and will broadly interpret the court's foundational requirement 'that victims refused the interviews for a reason or in a manner bearing on their credibility,...' " ■

Computer Corner

By Susie Tapia and Gene Parker
Information Technology/ Computers

We've Moved.....

The Public Defender's Home Web Page has moved and taken on a whole new look. Chuck Brokschmidt, our WebMaster, has given the Public Defender's Home Page a complete facelift. The new

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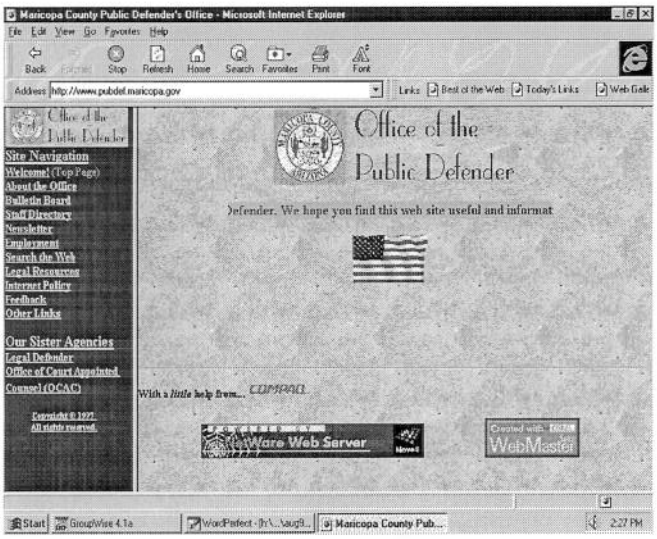
Home Page boasts a table of contents, a professional design, easier access to existing resources. In addition Chuck has added many new resources and links.

The new Home Page (shown below) can be found at **www.pubdef.maricopa.gov**.



To set the new Home Page as your default use the following steps:
(These steps are for Microsoft's Internet Explorer.)

1. Open the browser.
2. Type in the new web address: **www.pubdef.maricopa.gov**
3. Once the home page appears choose **View** from the pull down menu.
4. Choose **Options.**
5. Choose **Navigation**.
6. Click on **Use current**.

Your suggestions and comments are welcome to the Help Desk at x6198.

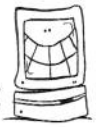
Internet Tip

Feel like your missing out on something? Ever visit a Web Page wondering how come no one ever updates the information? You could be missing out. Each time you visit a previously visited Web Page your computer remembers that page and displays the last version it saved. Without using the Refresh button all the time you may never see any updates or changes. The following steps will set your browser to always look for updates whenever you visit a web site, ensuring that you are always viewing the most current information available.

1. Open your browser.
2. Choose **View, Options** from the pull down menu.
3. Choose the **Advanced** tab.
4. Choose the **Settings** option under Temporary Internet Files.
5. Choose the option: **Check for newer versions of stored page.**
6. Choose **Ok** until all menus are closed.

Policy Reminder

Maricopa County Employees must abide by the Email and Internet Use Policy. Each employee must sign the policies before access will be granted to the Email system and to the Internet. For a complete detailed guideline please refer to the Acceptable Use Agreement that you each received.

Happy Computing!  Call the Help Desk at x6198.■

BULLETIN BOARD

New Attorneys

Mark Dubiel, attorney, started with the office August 18. He will be assigned to group C, effective September 9. Mark graduated from the University of Arizona's College of Law and served as Judge Hendrix's bailiff for several months.

Susan Frank, attorney, will begin working with the dependency unit, effective September 29. Susan comes to us from the Child Protective Services Division of the Arizona Attorney General's Office, where she has been employed as an attorney for the past several years.

Marci Kratter, attorney, started with the office August 18. She will be assigned to group B, effective September 9. Marci is a graduate of California Western School of Law and participated in a criminal internship with the Arizona Attorney General's Office last fall.

Michele Lawson, attorney, started with the office August 18. She will be assigned to group A, effective September 9. Michele is a graduate of Howard University School of Law in Washington D.C.. She worked as a Judicial Clerk for Arizona Court of Appeals Judge Cecil Patterson for the past two years.

Jeffrey Roth, attorney, started with the office August 18. He will be assigned to group B, effective September 9. Jeff graduated from ASU's College of Law and participated in our Legal Externship Program two years ago. For the past year he has been a judicial clerk for Arizona Chief Justice Thomas Zlaket.

(cont. on pg. 17)☞

Michael Ryan, attorney, started with the office August 18. He will be assigned to group A, effective September 9. Michael is a graduate of Fordham University School of Law in New York City. He has been in private practice in New York City and more recently was employed as an appellate staff attorney with the Appellate Division of the New York Supreme Court.

Scott Silva, attorney, started with the office August 18. He will be assigned to group C, effective September 9. Scott graduated from the University of Arizona College of Law and participated in the Pima County Public Defender Office's clinical internship program last fall.

Darrow Soll, formerly a Deputy Public Defender with the Pima County Public Defender's Office, joined our office August 25. Mr. Soll has been assigned to trial group A.

Michael Walton, attorney, started with the office August 18. He will be assigned to group B, effective September 9. Michael, a graduate of ASU's College of Law, participated in the Prosecutor Clinic with the Mesa City Court, and handled criminal matters with Wolf, Hirsch, and Blumberg.

Tammy Wray, attorney, started with the office August 18. She will be assigned to group A, effective September 9. Tammy graduated from ASU's College of Law and for the last two years has been a judicial clerk with Arizona Court of Appeals Judge Sheldon Weisberg.

New Support Staff

Rhonda Fenhaus, client services coordinator, began working with the dependency unit, effective August 25. She comes here from Child Protective Services.

Salina Godinez, 10th floor receptionist, began working in administration, effective August 18.

Dawnese Hustad, client services coordinator, began working with the dependency unit, effective August 25. Dawnese has been employed at Child Protective Services.

Stacy Morris, legal secretary, began working with trial group C, effective August 11.

Iris Pais, office trainee, began working with trial group D, effective August 4.

Jennifer Steel, legal secretary, began working with trial group B, effective August 18.

Support Staff Moves/Changes

Irma Gonzales, records clerk, left the office, effective August 22.

Cassie Goodwin, secretary, group B, left the office, effective July 30.

Lee Ann Hudson, legal secretary with trial group C, resigned from the office, effective August 11.

Christopher Hyler, office aide for Group D, left the office, effective August 1.

Ellen Kirschbaum, training adminstrator, resigned from the office, effective August 8.

Richard Lilly, law clerk, resigned from the office, effective July 25.

Henrietta Ruiz, legal secretary, officially resigned from the office, effective July 31. Henrietta has been a long-time, valued employee of this office and will be missed greatly. We wish her the very best. ■

Jury & Bench Trials
July 1997

Group A

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
7/14-7/16	Reece/Neus	Skelly	Wendell	CR 96-11522; Drive By Shooting; Agg. Asslt (2 cts.), All Dang	Directed Verdict for defendant after state's case on all counts	Jury
7/15-7/17	Ellig/ Yarbrough	Dunevant	Georgelos	CR 96-01592; PODD, C4F (with 2 priors)	Guilty	Jury
7/16-7/18	Leal	Tolby	Duvendack	TR 97-02159;DUI	Guilty	Jury
7/16-7/18	Lackey/ Robinson	Hilliard	Ryan	CR 93-07887; Agg.Asslt, Class 3 felony, Asslt,misd	Not Guilty on all counts	Jury
7/21-7/22	Tosto	Galati	Davis	CR 97-00483; Resisting Arrest, Class 6 Felony	Not Guilty	Jury
7/24-7/29	Timmer/ Jones	Arriola	Levine	CR 96-11773; POND,Class 4 felony, PODP, Class 6 felony	Guilty on both counts	Jury
7/28-7/31	Bond	Yarnell	Rehm	CR 95-12282; Agg. DUI, Class 4 felony	Not Guilty	Jury
7/29-7/30	Porteous	Sargent	Lauriston	CR 96-00146; Agg. DUI, Class 4 felony, no priors	Mistrial	Jury
7/21-7/25	McAlister	Schwartz	Eckhart	CR96-06755; Agg DUI, Class 4 felony	Not Guilty on Agg DUI Guilty on Driving on Supsended License	Jury

Group B

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
6/20-7/24	Agan, Lemoine, & Larry Debus and Assoc.	Bolton	Stevens - AG	CR 94-00200 5 counts fraud schemes/F2 10 counts theft/F3 1 count theft/F5	Not Guilty-2 counts theft/F3; Hung Jury-1 count theft/F3; Guilty-all other counts	Jury
6/26-7/1	Taradash/ Corbett	Hilliard	Gaertner	CR 96-10390 Selling Methamphetamine/ F2 3 cts. Trafficking in Stolen Property/F3	Hung (8-4 not guilty)	Jury
6/30-7/14	J. Brown, Grenier	Reinstein	Ditsworth	CR 96-02618 Ct. I - Murder 1st Degree, Capital/F1 Ct. II - Attempted Sexual Assault/F2 Ct. III - Kidnapping/F2 Ct. IV - Burglary/F3	Guilty	Jury

7/7-7/8	Sheperd/ Ames	Dairman	Pappalardo	CR 96-11927 Burglary 3°/F4 Theft/M1	Guilty	Jury
7/14-7/15	McCullough	McClennen	Boyle	CR 96-12677 Possession of Marijuana/F6	Hung (6-2 not guilty)	Jury
7-15/7-15	Melamed	Soto (West Phoenix Justice Court)	Reimeccrus	MCR 96-04879 Interferring with Judicial Proceedings/M1	Not guilty	Bench Trial
7-15/7-16	O'Donnell	Kaufman	Morrison	CR 96-05221 Ct. I - Aggravated DUI/F4 Ct. II - BAC over .10/F4	Guilty on both counts	Jury
7-15/7-17	Duncan	Hotham	Turoff	CR 93-07667 Smuggle/Transport Marijuana/F2	Guilty	Jury
7-17/7-18	Taradash	Gerber	Gorman	CR 97-01263 Aggravated Assault/F5	Hung (4 not guilty/3 guilty/1 undecided)	Jury
7-21/7-24	Sheperd	O'Toole	Lynch	CR 96-02962 Murder 2°/F1	Guilty	Jury
7-22/7-22	McCullough	Soto (West Phoenix Justice Court)	Carter	MCR 96-04110 Interfering with Judicial Proceedings/M1	Guilty	Bench
7-28/7-30	Taradash/ Corbett	McDougall	Gaertner	CR 96-10390 Selling Methamphetamine/F2 3 cts. Trafficking in Stolen Property/F3	Not Guilty	Jury
7-28/7-30	Burns	Martin	Pappalardo	CR 97-04213 Resisting Arrest/ F6	Guilty	Jury
7-28/7-31	Landry	O'Toole	Pitts	CR 97-02824 2 cts. Aggravated Assault /F6 Possession of Prohibited Weapon/F4	Guilty	Jury

Group C

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
6/17 - 6/23	Cotto/ Breen	Hendrix	McCauley	97-90118 Agg Aslt, F3	Guilty	Jury
6/23 - 7/3	Corbitt	Aceto	Gann	95-90117 Manslaughter, F2 Agg Assalt, F2 Endangerment, F2	Guilty of Lesser, Negligent Homicide Guilty Guilty	Jury
6/24 - 6/30	Fisher/ Breen	Hendrix	Kunkle	95-93277 3 cts. Agg Aslt, F3 7 cts. Endangerment, F6	Pled out one week into trial.	Jury
7/11 - 7/11	Schmich	Ore	Jennings	TR96-10447 DWI, M1	Guilty	Jury
7/14 - 7/15	Schumacher/ Clesceri	Araneta	Fuller	97-91525 Possession of Meth, F4	Guilty	Jury
7/14 - 7/22	Cotto/ Breen	Aceto	Miller	96-92254 Sex Miscond w/Mnr, F2	Guilty	Jury
7/22 - 7/24	Peterson/ Beatty	Skelly	Smyer	96-92300 Agg Aslt, F3D	Guilty of Lesser, Disord. Conduct Non-Dangerous	Jury
7/22 - 7/22	Leonard	Donevant	Vick	96-94048 Agg DUI, F4	Mistrial	Jury
7/23 - 7/24	Leonard	Donevant	Vick	96-94048 Agg DUI, F4	Guilty	Jury
7/24 - 7/29	Mackey/ Thomas	Ishikawa	Gundacker	96-91661 Agg DUI, F4	Guilty	Jury

Group D

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
7/1 - 7/2	Dwyer/ Applegate	Dougherty	Boyle	97-01199: Poss Cocaine	hung jury	Jury
7/1-7/3	Silva, Jung / Fusselman	Arriola	Capellini	CR 96-11135 AGG. DUI	guilty	jury
7/7 - 7/8	Willmott/ Bradley	McClennen	Mroz	96-13154; Theft	not guilty	Jury
7/9 - 7/9	Schreck	Peoria Pro Tem	Prelim	TR 97-00906; 2 cnts. DOSL - Misd.	guilty	Bench
7/9	Dichoso	Galati	Fleenor	CR #97-01755 POM	guilty	Bench
7/9 (East #1)	Silva	J. Camp	Rienecius	TR 96-1888 Driving Under Suspended License	guilty	Bench
7/10-7/15	Dichoso/ Lincoln	Arriola	Linn	CR 97-01755 Agg. Asslt. (Police X 2) Resist. Arrest	guilty	jury
7/14 - 7/24	Mussman, Kaplan/ Lincoln	Katz	Davidon	96-09452; Admin Narc Drug; Kidnap; Poss of Crack for Sale	Not guilty	jury
7/23 - 7-28	Billar	Kamin	Newell	96-13424 Agg. DUI Cl. 4 felony	Mistrial	Jury
7/28	Silva	Skelly	Larson	CR # 97-02389 PODD	guilty	Bench
7/28	Dichoso	Gutierrez (South J.Ct)	Nuebegauer	CR 96-10738 Assault/Disorderly, Cl. 3 Misdemeanors	guilty	Bench
7/24-7/31	Carrion	Katz	Eckhart	CR96-02442 2 cts Agg DUI	Not Guilty 2 Counts of Agg DUI Guilty of 2 Counts of DUI Not Guilty of Suspended License	Jury
7/24-7/29	Kibler	Cole	Boyle	CR 97-03126/1 Ct Poss of Marijuana/4 Cts Endangerment-Dangerous	Not Guilty 1 ct of Poss of Marijuana/Hung on 4 Cts of Endangerment	Jury

Office of the Legal Defender

Dates: Start/ Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
7/10-7/16/97	Parzych/Soto	Ishikawa	C.Smyer	96-93124 Agg.Asslt., F3D	Hung Jury	Jury Trial
7/16-7/30/97	Parzych/ DeSanta	Hendrix	W.Stewart	97-91325 (b) Ct. 1: SODD, C2F Ct. 2: POMS, C4F	 Guilty Dismissed	Jury Trial
7/28-7/29/97	Funckes/Soto	Padish	Georgelos	97-00140 Theft, C3F	Guilty	Jury Trial
7/15-7/24/97	Orent/ Brandenberger	D'Angelo	P.Howe	96-09038 Ct. 1: Agg.Asslt, C2F Ct. 2: Kidnapping, C2F Ct. 3: Agg.Asslt., C3F	Not Guilty on all counts Guilty of Lesser Included Misdemeanor Assault	Jury Trial

Announcement

Be sure to check out next month's newsletter when we announce the winner of the *for The Defense* article-writing contest!